FILED
DEC 27 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-569

IN THE SUPREME COURT OF THE UNITED STATES

MARVIN LOVE, PETITIONER

v.

DEPARTMENT OF JUSTICE, RESPONDENT

PETITION FOR REHEARING OF AN ORDER DENYING
A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I.

WHETHER THE PENALTY ASSESSED IN THE INSTANT CASE IS CONSISTENT WITH THE PENALTY ASSESSED IN OTHER CASES.

PARTIES

The parties to this proceeding are Marvin Love, Petitioner and Department of Justice, Respondent.

Mr. Love currently resides 7 PICAYUNE
Little Rock, Arkansas, 72211.

TABLE OF CONTENTS

STATEMENT OF THE CASE i

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PENALTY ASSESSED IN THE INSTANT CASE IS CONSISTENT WITH THE PENALTIES ASSESSED IN OTHER CASES. 1

CONCLUSION. 7

CASE NO._____

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MARVIN LOVE **PETITIONER**

V.

DEPARTMENT OF JUSTICE **RESPONDENT**

PETITION FOR REHEARING OF AN ORDER DENYING A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FEDERAL CIRCUIT

Marvin Love, petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit Court of Appeals opinion is reported in *Love v. Department of Justice*, 06-3071, June 7, 2006.

JURISDICTIONAL STATEMENT

Petitioner asserts that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1254 (1). The opinion of the Appeals Court was filed June 7, 2006. The jurisdiction was based on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

There are no constitutional questions in this case.

STATEMENT OF THE CASE

The appellant was employed as a criminal investigator with the Bureau of Alcohol, Tobacco, Firearms and Explosives. ("ATF"). The appellant's post of duty was the Little Rock Field Office, New Orleans Field Division. During the relevant time period, the Appellant owned vacant rental property at 6 Old Glory Court in Little Rock, Arkansas. This property had been vandalized and the appellant was seeking a tenant to fill the vacancy. On the morning of February 11, 2004, the Appellant received a telephone call from a prospective tenant responding to an advertisement for the property. The prospective tenant identified herself as Cynthia Ellis. Ms. Ellis spoke with the appellant about the rental property and stated that she could possibly view the property around noon that same day, although nothing was etched in stone. The appellant, at end of this conversation, was left with the impression that there would be follow up discussion to confirm a more precise meeting time. No further discussion took place between the appellant and his prospective tenant before the appellant left for lunch.

On February 11, 2004, the appellant drove his Government Furnished Automobile ("GFA") to a restaurant in order to have lunch. He left the office around noon and decided to stop at his rental property at 6 Old Glory Court, which is located proximally to Ryan's restaurant. The appellants' reasons for stopping are disputed. The appellant states that he stopped to inspect the property to assess what work he would need to do to prepare the property to show it to the tenant. The agency claims that the appellant went to the property in order to meet with his prospective tenant with whom he had agreed to meet after noon.

At approximately 12:00 p.m. the appellant arrived at 6 Old Glory Court and entered the residence there. Upon entering the residence, the appellant heard a noise in another section of the duplex, which led him to believe that an unauthorized individual was present in the property. The appellant then drew his service issued weapon and proceeded toward the location of the noise. There, he observed an intruder leaving the building through a window in the back bedroom. As the appellant approached the window, he was startled by a noise behind him and accidentally discharged his firearm. The weapon fired through the window.

The appellant proceeded to the nearby police Neighborhood Alert Center ("NAC"). There he reported the break in and the presence of the intruder, and indicated that there may be additional intruders on the property. There were no police officers at the station at that time, and the appellant was advised to return to his property as the officers were dispatched there. Little Rock Police Officer (LRPD) Deborah Allen was contacted by the NAC and asked to proceed to 6 Old Glory Court. While the appellant was waiting for Officer Allen to arrive, Ms. Ellis arrived at the residence.

The appellant showed Ms. Ellis the duplex and arranged to meet with her at 1:00 p.m. at a Wendy's restaurant near his office. The meeting at Wendy's was set in order to give her a rental application, which he had not brought with him, but left at his office along with everything else with which to conduct business, personal or otherwise. Ms. Ellis left. The appellant was at the residence when the police arrived. The appellant accompanied the police as they searched the building. Having dealt with Officer Allen before, the appellant did not inform the officers that he was a Federal Law Enforcement Officer, or that he had discharged

his weapon. Officer Allen discovered a young male hidden in the bedroom closet. The appellant drew his weapon during he apprehension of his male juvenile, who was identified as Eric Summers, a local youth. The juvenile was taken into custody. The appellant then left the property and proceeded back toward the office. As the juvenile was being processed he revealed to the officers that he saw the appellant and a lady walking in the house, and heard the male voice say "I hope I got the bastard." The juvenile also reported hearing a gunshot.

On his way back to the office, at approximately 1:10 p.m. the appellant stopped at the Wendy's where he had discussed meeting the prospective tenant. Ms. Ellis was not present, so the appellant returned to his office. There he joined SA Richard Coes, and departed with SA Coes to serve subpoenas in Pine Bluff, Arkansas. The appellant received a telephone call from Officer Allen on his personal cell phone as he was driving to Pine Bluff with Special Agent Coes. During this phone conversation, Officer Allen asked the appellant "what happened in the apartment before I arrived." The appellant asked the officer to ask specifically what she wanted to know. Officer Allen asked the appellant if he had fired his weapon in the apartment prior to the arrival of the police. The appellant responded in the affirmative. Officer Allen instructed the appellant to return to the NAC to discuss the incident further. SA Coes dropped the appellant off at his personal vehicle and proceeded to Pine Bluff to serve subpoenas. The appellant returned to the NAC, and was informed that he would need to make a statement to the LRPD at their detective division. The appellant returned to his place of work to draft a statement to submit to the detectives. Around 4:15 p.m. that day, as the appellant was walking to his car to deliver his statement to the LRPD Detectives he informed

Resident Agent in Charge (RAC) Jeff Brzozowski that he had something to tell him. The appellant then informed RAC Brzozowski that he had discharged the firearm. The purpose in informing the RAC was to explain the disruption in his schedule, as he had not gone to Pine Bluff to serve subpoenas with SA Coes as scheduled. RAC Brzozowski informed the appellant that such a discharge must be reported. The appellant disagreed, and RAC Brzozowski brought him back to his office to review the regulations and standing orders regarding the accidental discharge of a firearm. Subsequently, the discharge was reported up the chain of command to Assistant Special Agent in Charge (SAC) Robert Browning in New Orleans and a Significant Activity Report (SAR) was drafted, along with a memorandum, which also served as the narrative partition of the SAR. The purpose of the SAR was to explain the discharge of the fireman and the memorandum was limited to discussion of that event. The memorandum was sent the following morning, and was dated February 12, 2004.

The Agency Office of Inspection conducted an investigation in response to the SAR, during which they investigated the entirety of the appellant's actions on that day. On February 19, 2004, the appellant was interviewed by the Office of Inspection. Based on this interview and their findings, the Office of Inspection issued a report of Investigation (ROI) on April 21, 2004. On September1, 2004, the Professional Review Board proposed the appellant's removal on four reasons: (1) Inappropriate Handling of your ATF-Issued Firearm; (2) Failure to Report the Discharge of your ATF-Issued Firearm; (3) Willful Use of Government Furnished automobile (GFA) for Other Than Official Purposes; and (4) Lack of Candor. The appellant presented a written reply to Bureau Deciding Official (BDO) Kenneth Massey on

October 28, 2004 and an oral reply on October 29, 2004. BDO Massey, in his final decision, overturned reason 1, sustaining reasons 2, 3, and 4. Reasons 2, 3, and 4 were considered as factors in the appellant's removal.

The Appellant appealed his removal to the Merit System Protection Board. After a hearing, an administrative judge upheld the second and third charges but rejected the fourth charge as unsupported by the evidence and sustained the penalty of removal.

The Appellant appealed his removal to the Court of Appeals for the Federal Circuit. The decision to remove the appellant was affirmed.

REASONS FOR GRANTING THE WRIT

1.

THE PENALTY ASSESSED IN THIS CASE PRESENT CIRCUMSTANCES OF A SUBSTANTIAL OR COTROLLING EFFECT AND THE SUBSTANTIAL GROUNDS HAVE NOT BEEN PREVIOUSLY PRESENTED, AS THE PENALTY ASSESSED IN THE INSTANT CASE IS NOT CONSISTENT WITH THE PENALTY ASSESSED IN OTHER CASES.

PENALTIES/SANCTIONS IN OTHER CASES

Supervisor Jeff Grough, a white male, along with the agency, was sued early in Grough's career. The basis for the suit was Grough's involvement in a botched search warrant which resulted in an internal affairs investigation. Subsequently, Grough became the subject of two separate, simultaneous internal affairs investigations. Grough supervised a female, unpaid summer intern in his ATF Office. The intern qualified, subsequently applied and was accepted for a paid, part-time position called a stay-in-school. Apparently, in the eyes of the student and supervisor Grough, the conversion from the unpaid position to the paid position was taking too long. A problem arose during the background investigation of the intern. A plan was devised for the intern whereby, upon conversion to a paid position, to recoup time from the unpaid position by falsifying time sheets, duly signed by Grough. Once in the paid position, the intern routinely submitted time sheets for time not actually worked. The scheme came to light because an investigation aide in the

office and an acting supervisor had a problem approving the time sheets in Grough's absence. Both the investigative aide and the acting supervisor knew that the sheets in question were false. During the internal affairs investigation, Grough, as president of the local chapter of International Association of Bomb Technicians directed a task force agent under Grough's supervision, to contact a local Federal Firearms Licensee to donate a firearm for a raffle. Based on charges of the false time sheets and soliciting from a regulated industry, the agency sought to remove Grough. Grough was not terminated, instead he was demoted, served a suspension and was transferred to Washington, DC.

Supervisor, Jon Peterson, a white male, was arrested by the local police and charged with DWI, public intoxication and assault with a weapon. At the time of the incident, Peterson was at home drunk. Local teens put toilet paper all over Peterson's yard, and then drove away. Peterson got into his government owned vehicle, executed a traffic stop and held the teens at gun point with his government issued firearm. Local police arrested Peterson, who at the time of his arrest had a blood alcohol content of .22. The agency sought to remove Peterson. However, Peterson was not removed. Instead, he was demoted. He is no longer a Special Agent. He is an ATF compliance agent. Peterson was also transferred from Des Moines, IA to the District Office location in Kansas City, Missouri. Additionally, at the time of Peterson's incident, his wife was a stay- at- home mom. Peterson's wife was hired as part of the office staff, presumably because of Peterson's loss of availability pay, a reduction in pay of twenty-five percent.

Supervisor, Bill Buford, a white male, a certified firearms instructor and **Special Agent Glen Jordan, a white male,** were investigated for failure to report the accidental

discharge of a government-issued firearm. During range activities for the Little Rock, Arkansas Field Office, Glen Jordan was at the rear of the range while others were standing down range scoring targets. Jordan, also a certified firearms instructor and firearms instructor coordinator for the office, experienced an accidental discharge while standing at the rear of the range some 75 yards behind the other agents. Jordan was aiming into the woods to the side of downrange where most of the agents were standing. However, in the direction of Agent Jordan's aim just as the discharge occurred, an agent emerged from the woods. The accidental discharge was not reported to anyone or by anyone until internal affairs was notified via anonymous letter some two weeks to one month later. Although internal affairs investigated, the focus of the investigation was the author of the letter, rather than if the discharge occurred. No sanctions resulted.

Special Agent Joe Angelletta, a white male and others were assigned to the ATF Communications Center. The Communications is a twenty-four-hour-a-day, seven days-a-week operation. The agents assigned to the Communications Center hatched a scheme whereby two agents would be assigned to work overnight in the Center, although only one would actually work. The time sheets of each person would reflect the hours worked when only one was actually on duty in the Center. An internal affairs investigation proved that the practice had occurred for a number of years. Several agents were determined to have falsified time sheets in this manner. Most of the agents received sanctions, but none were terminated. Agent Angeletta and others served suspensions. Agent Angeletta was reassigned to an off-site treasury function.

Special Agent in Charge Cummins Beatty, a white male, was involved in more than one internal affairs investigation. Beatty interviewed a white female applicant in his hotel room

while at the conference. Beatty paraded this young lady about, in view of other Special Agents in Charge, as they attended a conference. The young lady was not hired and later reported improprieties on the part of Beatty. The young lady reported that she was not hired because she refused the advances of Beatty while in his hotel room. Based on the suit as filed by the young lady, she was later hired as a GS-12 Special Agent, a pay grade not realized by most until four of five years have passed. Beatty was not removed. Later, Beatty was again accused of sexual harassment. This time, he reportedly called the female secretary into his office while the door was closed. Upon entry to Beatty's office the secretary reportedly witnessed Beatty indecently exposed viewing a pornographic magazine. An investigation revealed at the very least, Beatty had paid for pornographic materials with his government issued credit card. Again, Beatty was not removed. Rather, he was relegated to the Special Response Team's training center at Fort McClellan, Alabama until such time as he retired.

Each of the aforementioned agents had favor with a supervisor on some level or another and each received the benefit of any doubt and more, in the internal affairs investigation and in the administration of punishment. Mr. Love, on the other hand, received no favor in that he only met Special Agent in Charge on one occasion. Also, the Assistant Special Agent in Charge at one time worked side by side with Mr. Love, as their hire date is within one month of one another in the very same office. He and Mr. Love competed for the same promotions. Addtionally, the aforementioned Assistant Special Agent in Charge was in competition with Mr. Love in 1992, and acting supervisor when the investigation was initiated into Mr. Love's automobile accident. The very same Assistant Special Agent in Charge initiated and was the principal in the investigation of Mr.

Love in 2004.

If sustained, the charges in the instant case although quite dubious, indeed constitute violations of agency policy. Similar charges in analogous cases and cases where white agents committed a crime resulted in less draconian punishment. Such disparities cannot be rationally explained. Mr. Love is the only Agent whose investigation did not also involve allegations against a supervisor. Mr. Love, an African American, is the only African American Agent mentioned in the outlined investigations and Mr. Love is the only Agent to be disciplined by removal for this type of violation. Such disparate treatment bespeaks discrimination. The intimation of discrimination resounds louder when one considers that no less than nine other African Americans who were removed from service within the last 18 to 24 months from an agency with a discriminatory reputation and is renowned for its "good ole boy" moniker. For Mr. Love to be removed on the basis of this investigation, coupled with the rate at which African Americans are removed as compared to White Americans leads one to the belief that a separate and unequal standard exists. Further, this practice lends credence to the belief that the agency, although desegregated is not integrated, in the year of our Lord, 2007 - a theological abomination.

CONCLUSION

For reasons set forth above petitioner asks that the court issue writ of certiorari to the United States Court of Appeals for the Federal Circuit and reverse the decision of the Federal Circuit in this matter and remand the case to the Agency for alternative disciplinary action short of termination.

Respectfully submitted,

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CERTIFICATION IN GOOD FAITH

I, Marvin Love, a party unrepresented by counsel, hereby certify that this petition is restricted to the grounds as set forth in Supreme Court Rule 44; is presented in good faith and not for delay.

_____

Marvin Love